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No. 91-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ALDEN WARD,

Petitioner,

v.

SAMUEL SKINNER, SECRETARY
OF THE UNITED STATES DEPARTMENT
OF TRANSPORTATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

What standard applies when a federal agency engages in "federally conducted activity" subject to the non-discrimination requirements of Section 504 of the Rehabilitation Act, and the Agency categorically excludes all persons with a specific handicap from a federal program; those set forth by this Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) and Traynor v. Turnage, 485 U.S. 535, 551 n. 11 (1988), or as the Court of Appeals held, a much more deferential standard, focused on whether the federal agency has acted "reasonably" in light of the "administrative burden of individualized inquiry"?

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PETITION FOR A WRIT OF CERTIORARI
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Alden Ward, an individual with epilepsy who has had no seizures for more than six years, petitions for a writ of certiorari to review the judgment of the First Circuit Court of Appeals in this case.

OPINION BELOW

The opinion of the First Circuit Court of Appeals, in which the court held that the respondent may categorically exclude all persons with a history of epilepsy from driving in interstate commerce, no matter how unlikely their risk of having a further seizure, is reported at 943 F.2d 157. It is reproduced as Appendix pp. 1a - 38a hereto. The decision of the respondent which is the subject of the Court of Appeals decision is reproduced as Appendix pp. 39a - 47a hereto.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on September 6, 1991. Petitioner invokes the jurisdiction of the Court under 28

U.S.C. §1254 (1988 ed.). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 2342(5) and 49 App. U.S.C. § 1653(c).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) provides:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be nedessary to carry out the amendments to this section made by the Rehabiloitation, Comprehensive

> Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Section 206(a) of the Motor Carrier Safety Act of 1984, 49 App. U.S.C. §2505(a) provides:

> Not later than 19 months after October 30, 1984, the Secretary shall issue regulations pertaining to commercial motor vehicle safety. Such regulation shall establish minimum Federal safety standards for commercial motor vehicles and shall, at a minimum, ensure that . . . the physicial condition of operators of commercial vehicles is adequate to enable them to operate safely . . . .

Section 206(f) of the Motor Carrier Safety Act of 1984, 49 App. U.S.C. § 2505(f) provides:

> After notice and an opportunity for comment, the Secretary may waive, in whole or in part, application of any regulation issued under this section with respect to any person or class of persons if the Secretary determines that such waiver is not contrary to the public interest and is consistent with the safe operation of commercial motor vehicles. . . .

49 C.F.R. § 391.41 provides in pertinent part:

> (a) A person shall not drive a motor vehicle unless he is physically qualified to do so...
>
> (b) A person is physically qualified to drive a motor vehicle if that person--...(8) Has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a motor vehicle.

The Administrative Procedure Act, 5 U.S.C. § 706, provides, in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --
>
> (1) compel agency action unlawfully withheld. . .;
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .
> (C) in excess of statutory jurisdiction authority, or limitations, or short of statutory right;

> (D) without observance of procedure required by law; . . .

STATEMENT OF THE CASE

In this case, the petitioner Alden Ward challenges the decision of the Federal Highway Administration of the United States Department of Transportation (the Department) to deny him a waiver from its regulation, 49 C.F.R. § 391.41(b)(8), which categorically prohibits an individual with epilepsy from driving a commercial vehicle in interstate commerce.

Petitioner Alden Ward is a thirty year old man who lives in Massachusetts with his wife and young son. He graduated from the Andover

Tractor Trailer School in June of 1987, and received his Class 1 Operator's License in July 1987. He was employed as a truck driver periodically from July 1987 through December 1989. His license has never been suspended or revoked.

Mr. Ward has a seizure disorder diagnosed in adolescence which caused infrequent, mostly nocturnal seizures. He takes medications which completely control his seizures. He has been completely seizure free since January 1984. This last seizure occurred after Mr. Ward consumed a substantial amount of alcohol; since that time he has stopped drinking except for an occasional glass of

wine. Mr. Ward's neurologist, Dr. N. Paul Rosman, a Professor at Tufts University School of Medicine, prepared a report that appears in the record. Therein, Dr. Rosman states that Mr. Ward regularly takes his medications and has developed a schedule to ensure that he does not forget to take them. Dr. Rosman concludes that, in light of Mr. Ward's freedom from seizures for more than six years, "there is no medical contraindication to his driving commercial vehicles such as a tractor trailer rig."

In May of 1989, while employed as a truck driver, Mr. Ward underwent a routine drug test in the course of his

employment. When the anticonvulsant medications were found in his urine, he was suspended from his employment as a truck driver. The suspension was pursuant to the Department's regulation, 49 C.F.R. § 391.41(b)(8), which prohibits an individual with epilepsy from driving a commercial vehicle in interstate commerce.

On April 23, 1990, Mr. Ward, by counsel, formally applied to the Department for a waiver from the regulation, pursuant to Section 206(f) of the Federal Motor Carrier Safety Act, 49 App. U.S.C. § 2505(f), which gives the Secretary of the Department the power to waiver any regulation promulgated under the Act. In support

of the wavier request Mr. Ward noted that he had been seizure-free for more than six years and had been medically cleared by Dr. Rosman to operate a tractor-trailer rig safely. Mr. Ward also submitted a report from Dr. Allan Krumholz, Professor of Neurology at the University of Maryland, an internationally recognized expert on epilepsy, and an advisor to the Department of Transportation on issues involving epilepsy and driving. Dr. Krumholz's report stated that the Department's blanket exclusion of people with epilepsy, and in particular people taking anticonvulsant medications, was not supported by medical evidence. As

discussed more fully below Dr. Krumholtz cited a report by a panel of experts convened by the Department which established that the risk of an individual like Mr. Ward having a seizure while driving was the same or less than the risk that a person who has never had epilepsy will suddenly have a seizure while at the wheel. Ward v. Skinner, 943 F.2d at 163.

The Administrator of the Federal Highway Administration, Mr. Thomas Larson, replied by letter dated May 29, 1990. Mr. Larson noted that the Department does not normally grant individual waivers and stated that the information Mr. Ward had provided was not sufficient to enable the

Department to determine whether to grant a waiver to Mr. Ward. Mr. Larson requested Mr. Ward's complete medical record and stated that the request for waiver would be treated as a request for rulemaking.

By letter dated July 26, 1990, Mr. Ward's counsel sent his complete medical record to Mr. Larson, as well as his driving record. Mr. Ward's counsel asked that the request for wavier be decided, not just treated as a request for rulemaking, given the delays involved in the rulemaking process.

On October 9, 1990, Larson denied the waiver request, relying on the Department's categorical exclusion of

persons with epilepsy, and particularly people with epilepsy who take anticonvulsant medications. He made no individualized determination of Mr. Ward's medical condition, the risk of harm to the public if Mr. Ward were allowed to drive, or the availability of any reasonable accommodations that could be provided to ensure that Mr. Ward would pose no public safety threat.

Mr. Ward then appealed to the United States Court of Appeals for the First Circuit. The Court of Appeals affirmed the Department's decision by an opinion dated September 6, 1991. The Court of Appeals held that there was no violation of Section 504,

because the Department could reasonably rely on the categorical exclusion of persons with epilepsy who take anticonvulsant medications in denying Mr. Ward's waiver request.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S PRIOR DECISIONS UNDER THE REHABILITATION ACT AND SERIOUSLY UNDERMINES THE PROTECTIONS AFFORDED BY THE ACT.

The decision of the Court of Appeals establishes a different and far more deferential Section 504 standard for the federal government in conducting federal programs than would be permitted for federal grantees (such as state and local governments) conducting similar if not identical activity. See i.e., Jackson v. State

of Maine, 544 A. 2d 291 (Me. 1988) (state regulation denying school bus license to diabetic violative of Section 504); Strathie v. Dept. of Transportation, 716 F.2d 227 (3rd Cir. 1983) (state regulation denying hearing impaired driver school bus license violative of Section 504). In reviewing local governmental activity under Section 504, this Court ruled in School Board of Nassau County v. Arline, 480 U.S. 273, 287 (1987), that, "in most cases . . . an individualized inquiry" must be made, in order to determine whether a handicapped person is "otherwise qualified" for the position in question. In the Court's words:

> Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.

Id. In addition this Court adopted a clear standard for when a handicapped person could be excluded from a local governmental program; the individual must pose a "significant health and safety risk" to himself or others. 480 U.S. at 287.

In Traynor v. Turnage, 485 U.S. 535 (1988), the Court discussed the unusual circumstances in which an individualized inquiry might lawfully be replaced by categorical

exclusion.[1] The Court there

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[1]At issue in Traynor was Congress's decision to distinguish among handicapped persons, not a decision to distinguish between handicapped persons and non-handicapped persons. Specifically, the Court was faced with the question of whether the Veteran's Administration could by regulation decide that all alcoholics (except those who are mentally ill) engage in "willful misconduct" and therefore are not eligible to receive benefits that Congress provided only to handicapped persons who do not engage in "willful misconduct". The Court answered the question in the affirmative, primarily because the petitioners were not denied benefits "'solely by reason of [their] handicap,' but because they engaged with some degree of willfulness in the conduct that caused them to become disabled." Id. at 550. The Court went on, however, to discuss circumstances in which categorical, handicap-based exclusions from activities to which Section 504 applies might be justified. Id. at 550-51.

indicated that such categorical distinctions are "inconsistent with § 504" unless they are based upon "a congressional determination supported by substantial medical evidence that all [persons] suffering from [the handicap in question] pose a serious health or safety threat". Id. at 550-51 n. 11 (emphasis added).

The standard applied by the First Circuit is inconsistent with the standard set forth by this Court in Arline and Traynor. The Court of Appeals held that categorical exclusions of handicapped persons from federal programs are allowed, as long as the agency's reliance upon a categorical rule is merely —

"reasonable" in light of administrative difficulties presented by individualized inquiries. Ward, 943 F.2d at 163.[2] The Court of Appeals focused on the categorical exclusion of all persons with epilepsy who are taking anticonvulsant

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[2]The First Circuit paid lip service to the requirement that a categorical exclusion must be sanctioned by Congress, 943 F.2d at 162-163, but conceded that a finding of Congressional approval of the exclusion at issue here was suspect. Id. at 163. The Court made clear that the result in the case was substantially based on the burdens an individualized process would place on the agency. Id. ("in any event, . . . we doubt that the [Rehabilitation] Act (even as interpreted in Arline) requires individualized inquiry to the point where doing so is unreasonably burdensome . . .").

medications.[3] The purported basis for the court's conclusion that that exclusion is "reasonable" was a 1988 report issued by a Task Force set up by the Department of Transportation. But the Task Force Report provided no medical support, let alone "substantial medical evidence," Traynor, 485 U.S. at 551 n. 11, that most, let along "all", id. , persons who have epilepsy that is controlled by medication pose a serious health or safety risk. Indeed, the First Circuit itself recognized that:

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[3]The First Circuit's decision reads as if the respondent's exclusion applies only to persons with a history of epilepsy who are taking

> The question about whether seizure-free epileptics taking anticonvulsant medicine should be authorized to drive commercial vehicles is obviously a close one. The Task Force Report itself points out that the risks of seizure or accident are extraordinarily low. [emphasis added.] It says that the risk of such an individual having an epileptic seizure while driving is "possibly at or even below baseline rates, i.e., less than the risk that a person who has never had epilepsy will suddenly have a seizure while at the wheel. (This latter risk is very low: in any given year about 50 out of 10,000 males will have a hart attack; about five out of 10,000 white males will have an epileptic seizure.)

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anticonvulsant medications. But a reading of the waiver decision, as well as the regulation it applies, shows that the exclusion in fact applies to all persons with epilepsy.

943 F.2d at 163. In addition, Dr. Krumholz, who was a member of the Task Force, stated in his own report submitted by Mr. Ward in support of the waiver request, that there was no medical basis for the categorical exclusion of such persons from the business of driving in interstate commerce. (Appendix pp. 48a - 54a)[4]

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[4] In spite of this dearth of medical evidence, the Task Force recommended against allowing persons who take anticonvulsant medications to obtain a license to operate a commercial vehicle on an unrestricted basis. Yet, it recommended against categorical exclusions, and "advise[d] that all evaluations be individualized, considering nature of seizures, risk of recurrence and specific job requirements . . ." Appendix to the Court of Appeals.

The information in the Report was therefore markedly insufficient to satisfy the Traynor and Arline tests. In upholding the Department's exclusionary policy, the First Circuit applied an unjustifiably deferential standard that is inconsistent with Section 504.

The First Circuit has in effect absolved the federal government of the obligation to make individualized inquiries into the qualifications of persons with disabilities -- an obligation that applies to all other governmental or private entities that are subject to Section 504 requirements. Federal agencies will routinely be able to satisfy the

deferential standard applied by the First Circuit. Individualized determinations inevitably place much greater administrative burdens on federal agencies than do categorical determinations. Moreover, there will almost always exist a statistical basis for predicting that persons with certain disabilities present some small increased statistical risk of harm. See Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1987); Kelby v. Bechtel Corp., 633 F.Supp. 927 (S.D. Fla. 1986). Under the First Circuit holding, this would be sufficient to support a finding that the agency's categorical exclusion was "reasonable" and therefore justified.

But that is precisely the result that Congress sought to prevent by enacting Section 504. As the Court in Arline so stated:

> The fact that some persons who have [certain diseases] pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with [those diseases]. Such exclusion would mean that those accused of [having such diseases] would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology -- precisely the type of injury Congress sought to prevent.

Arline, 480 U.S. at 285. Indeed, the result in this case is entirely inconsistent with Congress' decision to extend the prohibition against discrimination on the basis of

handicap equally to "any program or activity conducted by any Executive agency." Pub. L. 95-602, Tit. IV, §§ 119, 122(d)(2), 92 Stat. 2982, 2987, 29 U.S.C. § 794. Any state agency or private employer receiving federal funds that categorically barred handicapped persons from their programs would clearly violate Section 504. Strathie v. Dept. of Transportation, 716 F.2d 227 (3rd Cir. 1982); Jackson v. State of Maine, 544 A.2d 291 (Me. 1988). Yet, under the First Circuit standard, federal agencies that engage in the same conduct can regularly escape liability. Nothing in the language or legislative history of the

Rehabilitation Act justifies more favorable treatment of federal agencies than other entities that are alleged to have discriminated on the basis of handicap. Indeed Congress amended Section 504 in 1978 to cover "federally conducted activity" precisely to make federal agencies subject to the same non-discrimination requirements already applicable to state and local recipients of federal aid. See, 124 Cong. Rec. at 38, 551-552. See also, Doe v. Attorney General, 941 F.2d 278 (9th Cir. 1991) (by amending Section 504 Congress intended to place federal agencies on equal footing with federal grantees).

Nor does the fact that a federal agency's decision is subject to review for violation of the Rehabilitation Act under the Administrative Procedure Act, 5 U.S.C. § 706, warrant more deference being given to the federal agency. The First Circuit in Cousins v. Secretary of the U.S. Dept. of Transportation, 880 F.2d 603 (1st Cir. 1989), held that the Administrative Procedure Act is the exclusive vehicle by which a handicapped person alleging discrimination by the federal government may seek review under Section 504. But cf. Doe v. Attorney General, 941 F.2d 278 (9th Cir. 1991); Davidson v. United States Dept. of Energy, 838 F.2d 850 (6th Cir. 1988),

Cleghorn v. Harrington, 813 F.2d 992 (9th Cir. 1987). At the same time, the Court held that this does not result in any different standard of review being applied or to more deference being paid to the agency's allegedly discriminatory decision than would apply in an action brought directly under Section 504. Cousins, 880 F.2d at 606-608. Indeed, the federal government did not argue before the First Circuit that more deference is warranted because the case is brought under the Administrative Procedure Act.

The standard applied by the First Circuit is inconsistent with this Court's prior decisions under Section

504 of the Rehabilitation Act. If allowed to stand, it would cause serious erosion of the protections Congress extended to federal programs and activities. For this reason, the petition should be granted.

II. BECAUSE THIS COURT HAS NEVER EXPLICITLY DECIDED WHAT STANDARDS APPLY TO FEDERALLY CONDUCTED ACTIVITY UNDER SECTION 504, AT LEAST TWO CIRCUITS HAVE APPLIED SEEMINGLY DIVERGENT STANDARDS.

Traynor v. Turnage, 485 U.S. 535 (1988), is the only decision of this Court which addresses federally conducted activity and Section 504 of the Rehabilitation Act. However, Traynor, unlike the present case, did not involve discrimination between handicapped and non-handicapped

individuals. Thus this court had no opportunity as it did in Arline to address the standards for applying the non-discrimination provisions of Section 504. This Court has never addressed the non-discrimination provisions of Section 504 as applied to federally conducted activity in a true case of handicap discrimination, i.e. excluding handicapped persons (in this case epileptics) from a program while permitting participation by the non-handicapped.

This lack of precedent would appear to have caused differing results in at least two circuits, the First and Ninth. Compare Ward v. Skinner, 943 F.2d 157 (applying a

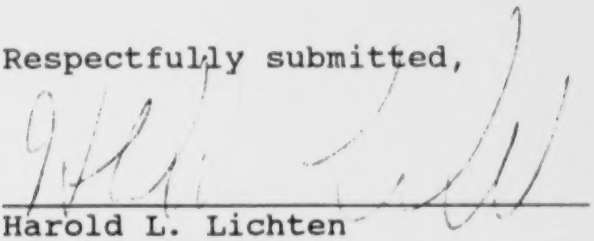
deferential standard) with Doe v. Attorney General of the United States, 941 F.2d 278 (allowing no deference). Therefore this case presents an appropriate opportunity to this Court to address as a matter of first impression the meaning of the non-discrimination provision of Section 504 as applied to federal programs.

CONCLUSION

Because the more favorable treatment afforded the federal government by the First Circuit decision does serious damage to statutory rights of handicapped persons who seek to participate in federal programs and activities, and

is unsupported by the plain language of Section 504, any legislative history, or this Court's prior decisions, the Court should grant this petition and reverse the decision below.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-2141

ALDEN WARD,
Petitioner,

v.

SAMUEL SKINNER,
IN HIS OFFICIAL CAPACITY AS
ACTING SECRETARY OF
THE UNITED STATES
DEPARTMENT OF TRANSPORTATION

BREYER, Chief Judge. Alden Ward, a truck driver with a history of epilepsy, takes anticonvulsant drugs and has had no seizures for seven years. The Secretary of Transportation nonetheless has denied Ward's request to waive a Department of Transportation (DOT) safety rule that disqualifies those with a history

of epilepsy from driving trucks in interstate commerce. See 49 U.S.C. app. § 2505(a)(3) (authorizing Secretary to issue safety regulations; 49 C.F.R. § 391.41(b)(8) (regulations prohibiting anyone with an "established medical history or clinical diagnosis of epilepsy" from driving commercial vehicles in interstate commerce); 49 U.S.C. app. § 2505(f) (authorizing waiver of DOT safety regulations). Mr. Ward now appeals DOT's waiver denial. He claims that it violates Section 504 of the federal Rehabilitation Act, which says:

> No otherwise qualified individual with handicaps,. . . shall by reason of her or his handicap, be . . . . subjected to discrimination . . . under any

> program or activity conducted by any Executive agency . . . .

29 U.S.C. §794. In our view, the denial of a waiver does not violate the Act. We therefore affirm the Secretary's determination.

Background

We can state the relevant legal, factual, and procedural background concisely. Since 1935 federal statutes have authorized the Secretary of Transportation to issue, and to enforce, regulations governing commercial motor vehicle safety. See Sections 204 (a)(1) and (2) of the Motor Carrier Act of 1935, 49 Stat. 543, 546 (1935) (current version at 49 U.S.C. app. 2505 (a)). A regulation, first issued pursuant to this

statutory authority in 1939, now says that a

> A person is physically qualified to drive a motor vehicle if that person . . . [h]as no established medical history or clinical diagnosis of epilepsy . . .

49 C.F.R. § 391.41(b)(8). See 4 Fed. Reg. 2294, 2295-96 (1939) (§§ 1.21(b), 1.31). A Department explanation of the section, which has appeared in the Federal Register from time to time since 1977, says that

> It is the intent [of this section] to permanently disqualify a driver who has a medical history or clinical diagnosis of epilepsy.

42 Fed. Reg. 60082 (1977).

The petitioner, Alden Ward, has a history of epileptic seizures. Anticonvulsant medicine, however, has kept those seizures under control; he

has had no seizures at all since 1984; and, he worked without incident as a truck driver until May 1989. At that time Ward's employer discovered his epileptic history and suspended him from his job, as DOT's regulation requires.

Mr. Ward then asked DOT to waive application of its regulation in his case. He pointed out that DOT's Secretary has the legal power to

> waive . . . application of any regulation . . . if the Secretary determines that such waiver is not contrary to the public interest and is consistent with the safe operation of commercial motor vehicles.

49 U.S.C. app. § 2505(f). He submitted medical information showing that his convulsions had last occurred

nearly six years earlier, that even then they were infrequent and nocturnal, and that anticonvulsant medicines effectively controlled them. He submitted a statement from his doctor to the effect that he should be permitted to drive a truck. And, he submitted a statement from Dr. Allan Krumholz, a nationally recognized expert on epilepsy who had served on a 1988 DOT medical "regulation-reevaluating" task force. Dr. Krumholz also said, in effect, that DOT should permit Ward to drive, and he added that, in his view, "the exclusion of individuals who are taking anti-epileptic or anticonvulsant medications for commercial driving is also wrong."

DOT initially pointed out that it currently was revising its "epilepsy-related" rules in light of the 1988 Task Force's recommendations, and it suggested that Ward simply participate in that rule-making proceeding. Ward noted, however, that rule-making and rule-revising can take a long time and that he needed his truck-driving job, so he asked DOT to rule on his waiver request. DOT then pointed (1) to the conceded fact that he was taking anti-convulsant medicine, (2) to the 1988 Task Force's recommendation <u>against</u> permitting those taking seizure-control medicine to drive, and (3) to the basic "anti-epileptic" regulation. It denied the waiver request. Ward

appeals that denial. He says that DOT failed to give his case the "individualized consideration" that the Rehabilitation Act requires, see 29 U.S.C. § 794; School Board of Nassau County v. Arline, 480 U.S. 273 (1987), and that, had it done so, it would have found him to be a safe driver and waive the "anti-epileptic" rule.

II

Reviewability

The Government initially argues that we cannot review the legality of the Department's decision to deny Ward a waiver. The Government concedes that courts may review the legality of almost any final agency action that adversely affects a private citizen.

5 U.S.C. § 702; Abbot Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967). But, it points out that the Administrative Procedure Act contains an exception to the "reviewability" norm where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). It notes that the Supreme Court has said in several cases that a particular kind of agency action may fall within the scope of this exception if there is "no law to apply." Webster v. Doe, 486 U.S. 592, 599-600 (1988); Heckler v. Chaney 470 U.S. 921, 835 (1985); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). It adds that the waiver statute permits, but does not require, the Secretary to waive any regulation

> if the Secretary determines that such waiver is not contrary to the public interest and is consistent with the safe operation of motor vehicles.

49 U.S.C. app. § 2505(f). It concludes that this discretionary authority is so broad, that, in effect, a reviewing court has "no law to apply." Hence, a waiver decision falls within the "committed to agency discretion" exception, and the law forbids review.

The short, nearly conclusive, answer to this claim, however, is that there is "law to apply." Mr. Ward says that the Department's refusal to grant him a waiver violates the Rehabilitation Act, an Act that applies to the Department's decisions, including decisions not to grant a

waiver, see Cousins v. Secretary of the Dept. of Transportation, 880 B.2d 603, 609 (1st Cir. 1989) (en banc), and which the Supreme Court has frequently interpreted. The Department's written opinions make clear that it denied the waiver because of Ward's epileptic condition. The legal issue is simply whether the denial of a waiver for this reason violated the Act.

Although the Department's broad "waiver" powers might mean that a private citizen, denied a waiver, would find it very difficult to show illegality based on the legal theory of "abuse of discretion," 5 U.S.C. § 705(2)(A), the breadth of that power does not limit our practical ability

to review this particular Rehabilitation Act issue. We can decide the Rehabilitation Act question in the "waiver" context as easily as in most other contexts. And, as far as we can tell, our doing so does not impose upon the agency an unusually heavy burden (i.e., a burden significantly heavier than the burden that judicial review imposes in other contexts). Cf., e.g., Heckler v. Chaney, 470 U.S. at 835 (no review of Federal Food and Drug Commisssioner's decision whether or not to "conduct examinations and investigations"). We can find no reason why a broad waiver power that might make it difficult for a private citizen to show an "abuse of discretion," or for a court to review

such a claim, would prevent us from reviewing other claims of illegality -- such as a claim that the Department's refusal to grant a waiver, say, rested on unconstitutional racial discrimination, or violated a specific provision of the Motor Vehicle Safety Act or, as here, violated the Rehabilitation Act.

The Supreme Court has sometimes used language that (out of context) might suggest that broad statutory authority, leaving the courts without "law to apply," could deprive the court of power to review other claims as well. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 410 (Marshall, J.); but cf.

Heckler v. Chaney, 470 U.S. at 850-54 (Marshall, J. dissenting) (making clear that courts can review constitutional and similar quations). But, the Supreme Court, to our knowledge, has only under very special circumstances held that a court lacks the power to review a claim that an agency action violates a specific statute or the Constitution. Where, for example, the very act of judicial review risks the impermissible interference with the exercise of a power -- say, the foreign affairs power -- for which the Constitution makes the Executive Branch of government primarily responsible, the Court has found the agency action "committed to agency discretion."

See, e.g., Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (refusing to review Civil Aeronautics Board award of an overseas air route which the President had approved, noting that "the very nature of executive decisions as to foreign policy is political, not judicial"). Cf. Webster v. Doe, 486 U.S. at 606-609 (Scalia, J., dissenting) (determining whether a decision is "committed to agency-discretion by law . . . requires evaluation of such factors as whether the decision involves a sensitive and inherently discretionary judgment call, . . . is the sort that has traditionally been nonreviewable, . . . and whether

review would have disruptive practical consequences") (internal quotations and citations omitted). In other circumstances, practical considerations of an agency's administrative needs, a broadly worded statute, and experience drawn from tradition may combine to suggest that routine court review of certain kinds of agency decision-making -- such as agency enforcement decisions -- threatens to impose unwarranted burdens on both court and agency, and that, consequently, such decisions are normally "committed to agency discretion by law." Heckler v. Chaney, 4780 U.s. at 835; See also Hahn v. Gottlieb, 430 F.2d 1243, 1249 (1st Cir. 1970) (refusing to review

Federal Housing Agency determination since "courts are ill-equipped to superintend economic and managerial decisions of the kind involved here"). None of these special circumstances is present here, however. Consequently, we can find no reason for departing from this circuit's precedent. See Cousins v. Secretary of the Dept. of Transportation, 880 F.2d at 609; NAACP v. Secretary of Housing and Urban Dev., 817 F.2d 149, 157-59 (1st Cir. 1987). And, we conclude that Ward's claim is reviewable.

III

The Rehabilitation Act

Mr. Ward's basic claim is that DOT, in denying him a waiver, violated the Rehabilitation Act -- an Act that makes it unlawful for DOT to forbid him from driving trucks "by reason of . . . his handicap," i.e., his epilepsy, if he is "otherwise qualified" to drive. (We suspect that, in this context, we should read the work "otherwise" to mean "nonetheless," for "otherwise," in its ordinary sense, means "without the handicap" in which case virtually every handicapped person would be "otherwise qualified.") He points out that in Arline, 480 U.S. at 287, the Supreme Court held that the Rehabilitation Act requires that "in most cases, the district court conduct

an individualized inquiry and make appropriate findings of fact" to determine if an individual is "otherwise" (or "nonetheless") qualified for the job. Ward says that DOT did not make a sufficiently individualized inquiry in his case; and, had it done so, it would have found that he can safely drive.

Of course, DOT did "individualize" its inquiry to some extent. It did not simply rely upon its absolute "anti-epilepsy" rule. It noted that a recent 1988 DOT medical task force had recommended that those with epilepsy be permitted to drive if they had had no seizures and had not taken anticonvulsant drugs for ten years. DOT asked Ward to submit

> complete copies of [his] . . . medical records related to the diagnosis and treatment of his epilepsy, and a copy of his complete driving record . . . .

DOT concluded from this information that Ward had been seizure-free for six years, but that he took anticonvulsant drugs. Noting that the Task Force recommended against an exception in such circumstances, it denied the waiver. The question before us is whether DOT could rely upon the general statement embodied in the Task Force conclusion, or whether the Act required it to make a more detailed and individualized inquiry into Ward's particular circumstances, in effect deciding whether it might be safe to permit driving by at least some epileptics who are seizure-free but use anticonvulsant drugs.

In our view, the Supreme Court's post-Arline case, Traynor v. Turnage, 485 U.S. 535 (1988), makes clear that the answer to this question is "no." The issue before the Supreme Court in Traynor resembles the issue before us. A statute granted physically or mentally disabled veterans an extension of time to apply for certain veterans' benefits unless the "physical or mental disability" was "the result of" their own "willful misconduct." 38 U.S.C. § 1662(a)(1). The Veterans' Administration (VA) denied the "benefit" of this rule to alcoholics (except where a separate physical or mental illness caused the alcoholism) on the ground that in all other instances alcoholism was the

result of "willful misconduct." See 38 C.F.R. § 3.301(c)(2). The petitioners, alcoholics, argued that the VA's alcoholism rule was overly broad, that (in addition to separate physical and mental illness cases) alcoholism did not always reflect "willful misconduct," and that the Rehabilitation Act (as interpreted in Arline) require the VA to make an "individualized inquiry" into the plaintiffs' special circumstances. Otherwise, said the plaintiffs, the VA was depriving them of "benefits" namely, the time extension) because of "handicaps" (namely, their allegedly non-willful alcoholism) although they were nonetheless "qualified" for the "benefit" (because their alcoholism

handicaps were not caused by "willful misconduct").

The Supreme Court, in Traynor, rejected the petitioners' argument

> that § 504 mandates an individualized determination of 'willfulness' with respect to each veteran who claims to have been disabled by alcoholism.

485 U.S. at 550. It said that § 504

> does not demand inquiry into whether factors other than mental illness rendered an individual veteran's drinking so entirely beyond his control as to negate any degree of 'willfulness' where Congress and the Veterans' Administraiton have reasonably determined for purposes of the veterans' benefits statutes that no such factors exist.

Id. at 551. And, in a footnote, it offered a practical reason in support of its holding, namely that an "individualized inquiry"

> would saddle the Government with additional administrative and financial burdens that Congress could not have contemplated in extending § 504 to federal programs.

Id. at 551 n.12. As we read this language, in its context, we believe the case holds than an agency, in treating handicapped persons, may sometimes proceed by way of general rule or principle, at least where 1) the agency behaves reasonably in doing so, 2) a more individualized inquiry would impose significant additional burdens upon the agency, and 3) Congress, as well as the agency, has expressed some kind of approval of the general rules or principles concerned.

Arline, in stating that in "most cases" there should be an "individualized inquiry," 480 U.S. at 287, does not necessarily hold the contrary. The Court there was speaking of district court proceedings, not agency rules, practices and regulations addressed specifically to the handicapped problem. And, the Court there spoke of "most" -- not "all" -- cases. We doubt that the Court's holding in Arline, even standing alone, would mean that the Department could not adopt reasonable rules concerning the relationship between certain handicaps, say poor vision, and certain activities like driving. But, whether or not Traynor represents a

change in the law, it is Traynor, not Arline, that governs the case before us.

For one thing, the petitioner here, as in Traynor, seeks an "individualized inquiry" that would permit him to escape the application of a general agency rule that would otherwise act as a handicap-based disqualification. In a sense, this case, like Traynor, involves distinctions among different categories of handicapped persons, distinctions which, in petitioner's view, will remove a subcategory of such handicapped persons from a more general category that penalizes him. For another thing, the burden of individualizing DOT's "waiver

application" inquiries, beyond what the agency has done already, would seem significant. The parties seem to disagree, not about any individual facts concerning petitioner's health, but about whether the Task Force's recommendation to disqualify those who, like petitioner, take anticonvulsant medicine, is a sound recommendation -- a matter more fit for a rule-making, than for a rule-waiver, proceeding (see pages 20 - 21, infra).

Further, as in Traynor, Congress has enacted legislation that suggests that some degree of awareness of, involvement in, or approval of the relevant regulation. In Traynor, the Court found approval in the fact that

Congress, enacting the "willfulness" language before it enacted the Rehabilitation Act, referred in legislative history to the VA's longstanding rules interpreting that word as excluding most alcoholism. See Traynor, 485 U.S. at 546, Citing S. Rep. No. 468, 95th Cong. 1st Sess. at 69-70 (1977). The Court considered itself legally obliged to try to read the Rehabilitation Act as consistent with this earlier Congressional understanding. Traynor, 485 U.S. at 548. Here, Congress enacted the transportation safety statute after it passed legislation applying the Rehabilitation Act to all federal programs. And, in doing so, it, in effect, repromulgated longstanding

agency regulations, such as the epilepsy regulation. It said specifically that commercial vehicle safety regulations "which the Secretary issued before October 30, 1984, . . . shall, for purposes of this chapter, be deemed to be regulations issued by the Secretary under this section." 49 U.S.C. app. § 2505(e).

We must concede that, in this last-mentioned respect (the degree of Congressional consideration), we see potential distinctions between this case and Traynor. We do not know that Congress, in 1984, actually thought about the epilepsy regulation or its relation to unwarranted discrimination (although it also seems unlikely that

anyone in Congress thought about this matter in respect to alcoholism in 1979 when Congress enacted the Rehabilitation Act). In any event, as we said, we doubt that the Act (even as interpreted in Arline) requires individual inquiry to the point where doing so is unreasonably burdensome (taking account not only of administrative needs but also of Rehabilitation Act policies). Our doubt, plus the strong similarity between this case and Traynor, leads us to apply here the legal standard that Traynor suggests. We therefore ask whether DOT's reliance upon a general Task Force recommendation (to deny a waiver to those with epilepsy who must take anti-seizure medicine)

was reasonable in light of both the administrative difficulties of further inquiry in the waiver contest and the anti-discriminatory policies embodied in the Rehabilitation Act.

After examining the record, we conclude that DOT's refusal, without making further "individualized inquiry," to grant a waiver was reasonable for the following reasons. First, DOT did inquire into some of Mr. Ward's individual characteristics. It determined that, although he had a history of epilepsy, he had not had a seizure for many years, but that he controlled his seizures through the use of anticonvulsant medicine.

Second, DOT relies upon a narrow version of its historic anti-epilepsy rule. It referred to its 1988 Task Force Report. That Report, unlike the pre-existing rule, would permit a narrow class of those with a history of epilepsy to drive commercial vehicles, namely those individuals without seizures for ten years who do not use drugs to control the seizures. That Task Force Report also concluded, however, that individuals with "Diagnosed Epilepsy Taking Anticonvulsant Medications with Seizures Controlled" should "not be authorized to drive commercial interstate vehicles."

Third, the Task Force Report's conclusion itself seems a reasonable one. The question about whether seizure-free epileptics taking anticonvulsant medicine should be authorized to drive commercial vehilces is obviously a close one. The Task Force Report itself points out that the risks of seizure or accident are extraordinarily low. It says that the risk of such an individual having an epileptic seizure while driving is "possibly at or even below baseline rates," i.e., less than the risk that a person who has never had epilepsy will suddenly have a seizure while at the wheel. (This latter risk itself is very low: in any given year about 50 out of 10,000

white males will have a heart attack; about five out of 10,000 white males will have an epileptic seizure). Yet, the Report goes on to say that the risk may be somewhat higher for truck drivers who keep odd hours or eat irregularly. And, it adds that the risk is low only if the individual actually takes his medicine; he may forget. The Report, after describing the very low risk, reasons as follows:

> Nonetheless, these individuals are exposed to conditions previously discussed [i.e., irregular sleeping and eating conditions] which in and of themselves increase the risk for seizure in seizure-prone individuals. In addition, the inconsistent access to medical care may cause difficulty in the evaluation of acute problems which may increase the risk for seizure occurrence, and the acquisition of replacement

> anticonvulsant medication if drugs are lost or forgotten, place such individuals at some increase in risk. These individuals should not be authorized to drive commercial interstate vehicles. It is impossible to predict which of these individuals may have seizures should they inadvertently miss a dosage of medication. However, this issue requiers further investigation and should be reassessed in the future when more data is collected.

The record does not permit us to conclude that this argument is an unreasonable one.

Fourth, the Task Force's position also suggests that further "individualized" investigation of Mr. Ward's individual case is most unlikely to provide reasons for believing he can drive commercial trucks safely; rather, further general studies and investigations, designed

to turn up general features tending to show greater, or lesser, degrees of risk, are what the Task Force seems to think are required.

Fifth, DOT says that it "plans to initiate a further review of the epilepsy rule based on the . . . conference report." DOT added that it would place the materials that Mr. Ward submitted, including the letter from Dr. Krumholz (who served on the Task Force), "in the public docket which we are opening on this subject." The nature of the inquiry that the Task Force suggested seems well suited to a general rule-making inquiry, for it likely involes consideration of risk rates, special feature of different cases that may

change those rates, and possible alternative ways of accommodating those in Mr. Ward's situation. A more thorough examination of Ward's case alone would seem less likely to shed light on the proper way for DOT to deal either with Ward himself or with those who share his circumstances. Of course, a change in the rule may help only those others; it may come too late to help Mr. Ward. But, given the nature of the problem and the Task Force recommendation, DOT's procedural decision, like its substantive decision, is reasonable.

We conclude that DOT could reasonably decide not to investigate Mr. Ward's case further and that it could rely upon the Task Force's

general, recommended rule in denying him a waiver from this rule forbidding those with a history of epilepsy to drive commercial vehicles in interstate commerce. Its decision is

Affirmed.

BEFORE THE
FEDERAL HIGHWAY ADMINISTRATION

In the Matter of	)
	)
ALDEN WARD,	)
	)
Petitioner.	)

PETITION FOR WAIVER
No. R-90-14

DECISION

Pursuant to section 206(f) of the Motor Carrier Safety Act of 1984 (MCSA) (49 U.S.C. App. § 2505(f)), the petitioner seeks a waiver from the requirement of the Federal Motor Carrier Safety Regulations (FMCSRs) (49 C.F.R. Parts 390-399) which prohibits a person with epilepsy from driving a commercial motor vehicle in interstate commerce. Section 206(f) of the MCSA authorizes the agency to

"waive, in whole or in part, application of any regulation issued under (Section 206) with respect to any person or class of persons," if it is determined that such action "is not contrary to the public interest and is consistent with the safe operation of commercial motor vehicles." The Federal Highway Administration (FHWA) has reissued the FMCSRs under the authority of the MCSA. This petition is, therefore, properly brought. For reasons stated below, the petition must be denied.

Mr. Ward has been diagnosed as having epilepsy, a chronic disorder characterized by paroxysmal attacks of brain dysfunction usually associated with some alteration of consciousness. Medical records

submitted with Mr. Ward's petition for a waiver indicate that Mr. Ward is currently taking anticonvulsant medications for the treatment of this disease to control seizures. New England Medical Center Hospitals, Clinical Laboratories Outpatient Reports dated April 3 and March 7, 1990; Dr. N. Paul Rosman, Note dated March 5, 1990. He has apparently been seizure free for approximately six (6) years. Dr. N. Paul Rosman, Note dated March 5, 1990.

Section 391.41(b)(8) of the FMCSRs (49 C.F.R. § 391.41(b)(8)) provides that a person with a medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a motor

vehicle is not medically qualified to drive a commercial motor vehicle. Waivers from this standard have not been granted.

Mr. Ward originally requested a waiver from the applicable regulation by letter dated December 28, 1989. This request was denied by letter dated January 19, 1990. On April 23, 1990, counsel for Mr. Ward wrote to the FHWA, again requesting a waiver for Mr. Ward. This request was denied on May 29, 1990. This denial advised counsel that,

> An individual waiver would only be granted in a case wherein it is determined that such a waiver is not contrary to the public interest and is consistent with the safe operation of commercial motor vehicles. However, the information now available to us is insufficient for us to determine that granting Mr. Ward a waiver at this time would be consistent with the safe operation of commercial

> motor vehicles and not contrary to the public interest. The additional information which we would require to make such a determination would include complete copies of Mr. Ward's medical records related to the diagnosis and treatment of his epilepsy, and a copy of his complete driving record from the State licensing agency which granted Mr. Ward a license to drive.

This letter also advised counsel that the FHWA intended to initiate rulemaking to review this driver qualification standard, and that the agency would consider Mr. Ward's request as a petition for rulemaking. In this regard, however, FHWA's May 29 letter informed petitioner that the agency, in reviewing the epilepsy standard, had convened a conference of neurologists and transportation experts to make recommendations to the agency. These recommendations

included one which, if adopted, would nonetheless prohibit persons taking anticonvulsant medications to control epileptic seizures from driving commercial motor vehicles in interstate commerce.

By letter dated July 26, 1990, Mr. Ward, through counsel, requests that the agency not consider Mr. Ward's request as a petition for rulemaking, but rather that the agency reconsider its May 29 denial of Mr. Ward's request for a waiver. Additional medical records, a copy of Mr. Ward's driving record from the Commonwealth of Massachusetts Registry of Motor Vehicles, and a list of employers for whom Mr. Ward has driven a truck were submitted with this request for reconsideration.

The additional medical records submitted confirm that Mr. Ward is currently taking anticonvulsant medication to control seizures which, apparently, would accompany his epilepsy but for the medication. The submitted medical records do not indicate that Mr. Ward is otherwise medically qualified to drive. See 49 C.F.R. §§ 391.11(b)(6), 391.41, 391.43 and 391.45. The submitted employment record lists the names and addresses of 10 employers, including leasing companies, for which Mr. Ward claims he has driven between July 1987 and December 1989. Finally, Mr. Ward's driving record as recorded by the Commonwealth of Massachusetts Registry of Motor Vehicles indicates, inter alia, that Mr. Ward has been convicted

of speeding four (4) times between January 1985 and July 1989.

Mr. Ward's request that the agency reconsider its denial of a waiver to him does not set forth any argument which would support such a finding. Mr. Ward has not shown how granting a waiver to him would be consistent with the safe operation of commercial motor vehicles and not contrary to the public interest.

Nor does Mr. Ward's petition explain how the granting of the requested waiver would be consistent with safety on the highways. The regulations have obvious safety purposes. With respect to drivers, they are intended to assure that only qualified individuals are operating large commercial motor vehicles in

interstate commerce where, because of their size, they are capable of causing extensive damage to life and property.

Based on the information provided in the petition and the foregoing discussion, I am unable to make a determination that granting the requested waiver is in the public interest and consistent with the safe operation of commercial motor vehicles.

Accordingly, the petition is denied.

Dated: Washington, D.C.

October 9, 1990

T.D. Larson
Administrator

SCHOOL OF MEDICINE
UNIVERSITY OF MARYLAND AT BALTIMORE

Department of Neurology
22 South Greene Street
Baltimore, Maryland 21201

January 21, 1990

Ms. Deborah Piltch
Advocate Disability Loss
Center, Inc.
11 Beacon St., Suite 925
Boston, Mass. 02108

Dear Ms. Piltch:

Thank you for your inquiry concerning my opinion regarding the case of Mr. Ward, who is prohibited by the Department of Transportation's regulations from obtaining appointment as an interstate truck driver because he has a history of epilepsy. I believe that current Department of Transportation's regulations are in fault because they do not provide for individualized determinations of

driving ability. Blanket exclusion of all persons with a history of clinical diagnosis of epilepsy from driving either personal vehicles or driving commercial vehicles is in my opinion discriminatory.

Epilepsy is a disorder of the brain characterized by recurrent epileptic seizures. Epilepsy is a disorder of motor, sensory, or conscious function that is due to an abnormal electrical discharge in the brain. In general, we consider someone to have epilepsy when they have recurrent epileptic seizures.

There are many different kinds of seizures and the prognosis for epilepsy varies. In general the prognosis for seizure control is reasonably good. Between 55 and 70%

of individuals with epilepsy have seizure remissions, which means that they stop having seizures for periods of at least three to five years. After an individual has stopped having seizures for a period of three to five years, the chances of having another seizure in the next two years are approximately 3 to 5%, and once they have been seizure free for five years the risk of having another seizure is about 1% a year, and about 5% (sic) per year thereafter. Although one can never be absolutely certain that seizures will not occur, the risk of having recurrent seizures once seizures have been controlled for a period of three to five years is very small. If the individual is on anticonvulsant medication, this may

further reduce the risk of recurrent seizures, but many individuals will have recurrent seizures even off of anticonvulsant medications.

In view of the variable nature of seizures, and the variable types of commercial driving that exists, I think it is very important that individualized determinations of driving ability be performed. I think this is true for individuals who drive personal vehicles, but I think it is also important for commercial drivers. In fact, the present regulations concerning commercial drivers with epilepsy are not individualized and rather arbitrary in some ways. For example, it is stated in present regulations that if a person has had seizure surgery and has

been free for several years that he is able to serve as a commercial driver, but I think the risk of recurrence for these individuals is not substantially different than for individuals who have been seizure free for several years without surgery.

In addition, I think the exclusion of individuals who are taking anti-epileptic or anticonvulsant medications from commercial driving is also wrong. Indeed, the individual who is taking anticonvulsant medications and has a history of seizures may actually be less likely to have recurrent seizures than the person who is not taking anticonvulsant medications. I do not feel that anticonvulsant medications should be an absolute contraindication to commercial driving.

In general, I again emphasize the need of individualized determination of driving ability. Without such individualized determinations there is the potential for serious discrimination and actions that could seriously harm the welfare of individuals disabled by disorders like epilepsy. I also enclose the report of a recent federal task force of which I was a member.

I enclose for your information some references regarding epilepsy and driving. I hope these will be of some use to you. In addition, I enclose a manuscript that was recently published by Dr. Robert Fisher and myself. Another manuscript is presently in preparation and will soon be available for your use and I will forward it to

you when I am permitted to do so by the publishers. I also enclose the report of a recent federal task force of which I was a member.

Sincerely yours,

Allan Krumholz, M.D.
Professor of Neurology